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USAA CASUALTY INSURANCE COMPANY

**IN UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JEREMY R. WHITELEY,

Plaintiff,

vs.

USAA CASUALTY INSURANCE
COMPANY,

Defendant.

CASE NO.: 2:24-cv-00138-FLA-MAA

**DEFENDANT USAA CASUALTY
INSURANCE COMPANY'S
STATEMENT OF
UNCONTROVERTED FACTS IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: March 14, 2025

Hearing Time: TBD

Crtrm.: 6B

Judge: Hon. Aenlle-Rocha

Cmplt. Filed: Jan. 5, 2024

Defendant USAA Casualty Insurance Company ("USAA CIC") respectfully
submits its Statement of Uncontroverted Facts in support of its Motion for Summary
Judgment:

I.
USAA IS ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFF’S
CLAIMS FOR BREACH OF CONTRACT, BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH AND FAIR DEALING, DECLARATORY
RELIEF, AND PUNITIVE DAMAGES

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
1. USAA CIC issued Homeowners Policy, No. 007778375-90A, to Plaintiff Jeremy Whiteley (“Homeowners Policy”).	Declaration of Jessica Ross in Support of USAA’s Motion for Summary Judgment (“Ross Decl.”) at Exhibit 1.
2. USAA CIC issued Umbrella Policy, No. 007778375-70U, to Plaintiff Jeremy Whiteley (“Umbrella Policy”).	Ross Decl. at Exhibit 2.
3. On March 28, 2022, non-profit Breaking Code Silence (“BCS” filed a complaint against Whiteley and Katherine McNamara (“McNamara”) alleging causes of action for violations of the Computer Fraud and Abuse Act (18 U.S.C. §1030) and California’s Computer Data Access and Fraud Act (Cal. Penal Code § 502) (“BCS Complaint”).	Declaration of Barbara Gonzalez (“Gonzalez Decl.”) in support of USAA CIC’s Motion for Summary Judgment at ¶6, Exhibit 3.
4. The Homeowners Policy states: UNIT OWNERS – HOMEOWNERS POLICY -PERSONAL INJURY ENDORSEMENT- COVERAGE E – PERSONAL LIABILITY	Ross Decl., Exhibit 1 at WHITELEY_HO_CP_065.

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2		
3	If a claim is made or a suit is brought	
4	against any “insured” for damages	
5	because of “bodily injury” ,	
6	“property damage” or “personal	
7	injury” caused by an “occurrence”	
8	to which this coverage applies, we	
9	will:	
10		
11	* * *	
12	1. Provide a defense at our	
13	expense by counsel of our	
14	choice, even if the suit is	
15	groundless, false, or	
16	fraudulent...	
17		
18	We will not pay for punitive	
19	“damages” or exemplary	
20	“damages” , fines or penalties.	
21		
22	5. The Homeowners Policy’s Personal	Ross Decl., Exhibit 1 at
23	Injury Endorsement defines “personal	WHITELEY_HO_CP_065.
24	injury” and “occurrence”:	
25	“Personal Injury” means:	
26	b. Libel.	
27	c. Slander.	
28	d. Defamation of character.	
	e. Invasion of rights of	
	privacy.	

	“Personal injury” only	
	applies when the conduct is	
	not malicious or criminal in	
	nature.	

	“Occurrence” means:	
	a. An accident ... which	
	results, during the policy	
	period, in “bodily	
	injury” or “property	
	damage” ...	

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	b. An event or series of	
3	events . . . proximately	
4	caused by an act or	
5	omission of any	
6	“insured”, which	
7	results, during the policy	
8	period, in “personal	
9	injury”, neither	
10	expected nor intended	
11	from the standpoint of	
12	the “insured.”	
13	6. Homeowners Policy defines “bodily	Ross Decl., Exhibit 1 at
14	injury” and “property damage” as:	WHITELEY_HO_CP_008-009.
15	- DEFINITIONS -	
16	***	
17	2. “Bodily injury” means	
18	physical injury, sickness or	
19	disease, including required	
20	care, loss of services and	
21	death that results.	
22	“Bodily injury” does not	
23	include mental injuries	
24	such as: emotional distress,	
25	mental anguish,	
26	humiliation, mental	
27	distress, or any similar	
28	injury unless it arises out of	
	physical injury to the	
	person claiming a mental	
	injury.	

	18. “Property damage” means	
	physical damage to, or	
	destruction of tangible	
	property, including loss of	
	use of this property.	
	7. The Homeowners Policy and	Ross Decl., Exhibit 1 at
	Personal Injury Endorsement	WHITELEY_HO_CP_065.
	included the following exclusions:	
	- SECTION II – EXCLUSIONS -	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
<p>1. Coverage E Personal Liability and Coverage F Medical Payments to Others do not apply to “personal injury”:</p> <p>a. which is expected or intended by the “insured” . . .</p>	
<p>8. The Umbrella Policy’s personal liability coverage provides:</p> <p>PERSONAL UMBRELLA POLICY</p> <p>- INSURING AGREEMENT -</p> <p>***</p> <p><u>B. Defense.</u></p> <p>1. If a claim is made or a suit is brought against any insured for bodily injury or property damage arising from an occurrence to which this policy applies, or for personal injury to which this policy applies, we will provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent...</p>	<p>Ross Decl., Exhibit 2 at WHITELEY_UMB_CP_011.</p>
<p>9. The Umbrella Policy defines “bodily injury” identical to the Homeowners Policy, and includes the following additional definitions:</p> <p>-DEFINITIONS-</p> <p>***</p>	<p>Ross Decl., Exhibit 2 at WHITELEY_UMB_CP_010.</p>

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	N. “ Occurrence ” means an	
3	accident, including	
4	continuous or repeated	
5	exposure to substantially	
6	the same general harmful	
7	conditions, which results,	
8	during the policy period, in	
9	bodily injury or property	
10	damage.	
11	O. “ Personal injury ” means	
12	injury arising out of one or	
13	more of the offenses listed	
14	below . . .	
15	1. Oral, written or	
16	electronic publication	
17	of a false statement that	
18	defames a person’s or	
19	organization’s	
20	character or reputation.	
21	2. Oral, written or	
22	electronic publication	
23	of material that violates	
24	a person’s right of	
25	privacy by publicly	
26	disclosing private facts.	
27		
28	10. The Umbrella Policy sets forth the	Ross Decl., Exhibit 2 at
	following exclusions:	WHITELEY_UMB_CP_013-014.
	- EXCLUSIONS -	

	D. This insurance does not	
	apply to personal injury	
	which results from a false	
	statement if done by or at	
	the direction of any	
	insured with knowledge	
	that the statement was	
	false, or made with	
	reckless disregard for the	
	truth.	

	G. This insurance does not	
	apply to bodily injury,	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
<p>property damage or personal injury:</p> <p>***</p> <p>7. Arising out of a criminal act or omission by, or with either the knowledge or consent of, any insured.</p> <p>***</p> <p>10. Arising out of any contract or agreement.</p>	
<p>11.The BCS Complaint alleged Whiteley “engaged in acts of cyberhacking directed to BCS”.</p>	<p>Gonzalez Decl., ¶6, Exhibit 3 at ¶7.</p>
<p>12.The BCS Complaint alleged Whiteley “set-up the website infrastructure” and the “hosting account for the BCS website”.</p>	<p>Gonzalez Decl., ¶6, Exhibit 3 at ¶11.</p>
<p>13.The BCS Complaint alleged Whiteley “was the alter ego of [McNamara]”, “was a co-conspirator of [McNamara]” and “acted intentionally . . . and pursuant to an agreement [with McNamara] . . . to obtain and convert secret, confidential, and proprietary information [and] documents” for “their own competitive advantage, and to deprive BCS of the use of such property in business”.</p>	<p>Gonzalez Decl., ¶6, Exhibit 3 at ¶13-15.</p>
<p>14.The BCS Complaint alleged Whiteley “exercised an extreme act and maliciously accessed BCS’s account with Google” and “caused the website</p>	<p>Gonzalez Decl., ¶6, Exhibit 3 at ¶36.</p>

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	to be deindexed” using Whiteley’s	
3	former administrative credentials	
4		
5	15. The BCS Complaint alleged Whiteley	Gonzalez Decl., ¶6, Exhibit 3 at ¶39.
6	“maliciously attempted to remove	
7	and/or gain control of the BCS	
8	website and corresponding Google	
9	Webmaster Central permissions”.	
10		
11	16. The BCS Complaint alleged Whiteley	Gonzalez Decl., ¶6, Exhibit 3 at ¶43.
12	“attempted or succeeded at changing	
13	the content of the [BCS] website” and	
14	accessed BCS’s AdWords account	
15	without authorizations.	
16		
17	17. The BCS Complaint alleged	Gonzalez Decl., ¶6, Exhibit 3 at ¶27.
18	McNamara “started creating tension	
19	on BCS’s board and began	
20	regularly spreading gossip and	
21	slandorous lies about fellow board	
22	members among volunteers and in	
23	the survivor community”.	
24		
25	18. The BCS Complaint alleged	Gonzalez Decl., ¶6, Exhibit 3 at ¶30.
26	McNamara “conspired with other	
27	volunteers and employees of BCS,	
28	including Mary “Meg” Applegate	
	and Caroline (Cole) Lorson, to	
	download BCS’s files and	
	confidential data, including an	
	entire Google Drive, without BCS’s	
	authority or permission, and in	
	specific instances, even tamper	
	with, destroy, and deny access to	
	portions of BCS data from such	
	Google Drive . . .”.	
	19. The BCS Complaint alleged “once	Gonzalez Decl., ¶6, Exhibit 3 at ¶32.
	[McNamara] was satisfied that she	

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	had gutted the entirety of BCS’s	
3	electronically stored information,	
4	she encouraged additional	
5	volunteers and board members to	
6	leave BCS under false pretenses”.	
7	20. The BCS Complaint alleged	Gonzalez Decl., ¶6, Exhibit 3 at ¶37.
8	“Lifetime was promoting a made-	
9	for-TV film based on the true	
10	stories of two TTI survivors, which	
11	. . . highlighted BCS’s work on the	
12	TTI-survivor and victim	
13	communities. [Whiteley and	
14	McNamara’s] conduct prevented	
15	BCS from being able to promote the	
16	documentary . . .”	
17	21. The BCS Complaint alleged “the	Gonzalez Decl., ¶6, Exhibit 3 at ¶38.
18	deindexing of the BCS website	
19	blocked its primary and largest	
20	source of traffic, organic searches,	
21	cutting off the website’s main	
22	source of exposure” and “reflected a	
23	significant and dramatic drop in	
24	traffic”.	
25	22. The BCS Complaint alleged “. . .	Gonzalez Decl., ¶6, Exhibit 3 at ¶45.
26	the harm caused by [Whiteley and	
27	McNamara] is irreparable, e.g. the	
28	breach of the trust of the public	
	sought to be served by BCS, the	
	unknown extent to which they have	
	reviewed and destroyed BCS	
	confidential information, emails,	
	intellectual properties, and other	
	files, and damaged relationships	
	after Defendant McNamara and her	
	colleagues at UnSilenced made	
	defamatory statements to valued	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
partners, resulting in strained and, in some cases, terminated valued relationships. In this lawsuit, BCS seeks an injunction . . . “	
23. The BCS Complaint alleged “as a direct and proximate result of [Whiteley and McNamara’s] conduct BCS has suffered extensive damages in excess of \$5,000 . . . Such damages include . . . lost business opportunities and monetary donations, and disclosure of misleading information to the public.”	Gonzalez Decl., ¶6, Exhibit 3 at ¶47.
24. The BCS Complaint alleged “BCS also seeks recovery for lost goodwill as a result of [Whiteley and McNamara]’s dissemination of false information by impersonating BCS. Defendants have also greatly and unjustly enriched themselves used BCS’s social media accounts and proprietary information at BCS’s expense.”	Gonzalez Decl., ¶6, Exhibit 3 at ¶48.
25. The BCS Complaint alleged “During this period of service interruptions, BCS suffered losses of revenue and donations . . . lost thousands of dollars in donations, revenues, and in potential future growth . . .”	Gonzalez Decl., ¶6, Exhibit 3 at ¶73.
26. On April 21, 2022, Whiteley notified USAA CIC of the lawsuit.	Gonzalez Decl., ¶6, Exhibit 4.
27. On April 22, 2022, USAA CIC	Gonzalez Decl., ¶7, Exhibit 5.

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	Adjuster Kaczmarek was assigned	
3	to the claim.	
4		
5	28. On April 22, 2022, Kaczmarek	<i>Id.</i>
6	reviewed the BCS Complaint and	
7	noted it alleged Whiteley “engaged	
8	in cyber hacking directed to BCS,	
9	including but not limited to the	
10	unauthorized access of servers and	
11	networks”, and then reviewed the	
12	Homeowners Policy.	
13		
14	29. On April 22, 2022, Kaczmarek	Gonzalez Decl., ¶8, Exhibit 6.
15	spoke with Whiteley regarding the	
16	BCS Complaint.	
17		
18	During the call, Whiteley denied	
19	taking part in the allegations and	
20	stated he believed he was named in	
21	the lawsuit as an act of retaliation	
22	by BCS.	
23		
24	Kaczmarek advised Whiteley	
25	“based on the suit and wording of	
26	the policy, there does not appear to	
27	be coverage for the loss or legal	
28	representation as the loss does not	
	meet the definition of an occurrence	
	under the policy”, but that USAA	
	CIC’s final coverage determination	
	was pending review by its legal	
	team.	
	30. On April 22, 2022, Whiteley sent a	Gonzalez Decl., ¶8, Exhibit 7.
	digital message to Kaczmarek	
	disputing his statements regarding	
	coverage.	
	31. On April 22, 2022, Kaczmarek	Gonzalez Decl., ¶9, Exhibit 8.

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2		
3	requested internal review and	
4	recommendation regarding the BCS	
5	Complaint in conjunction with the	
6	Homeowners Policy by a manager	
7	and director.	
8		
9	32. On April 22, 2022, Manager of	Gonzalez Decl., ¶9, Exhibit 9.
10	Claims Operations Kathryn	
11	Mashaw reviewed the BCS	
12	Complaint, Homeowners Policy,	
13	and Kaczmarek’s request, and	
14	recommended:	
15		
16	“Agree w/[Kaczmarek’s]	
17	recommendation. Accusations do	
18	not meet definition of occurrence	
19	and no property damage present.	
20	Deferring to [Director of Claims	
21	Operations].:	
22		
23	33. On April 23, 2022, Director of	Gonzalez Decl., ¶10, Exhibit 10.
24	Claims Operations Barbara	
25	Gonzalez (“Gonzalez”) reviewed	
26	the Homeowners Policy and BCS	
27	Complaint, and stated:	
28		
	“DCO review does not find any	
	allegations or actions that would	
	meet the definition of [bodily injury	
	or property damage] under the	
	policy and therefore does not see a	
	duty to defend . . . DCO authorized	
	further review by [outside	
	counsel].”	
	“DCO agrees with [Kaczmarek] and	
	[Mashaw] that allegations do not	
	meet [definition of bodily injury or	
	property damage].”	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
<p>34. On April 26, 2022, Kaczmarek called outside counsel Daniels Fine Israel Schonbuch & Lebovits to request a coverage review.</p>	<p>Gonzalez Decl., ¶11, Exhibit 11.</p>
<p>35. On April 26, 2022, Whiteley sent multiple digital messages to Kaczmarek, stating:</p> <p>“I have hired an attorney with extensive experience with this type of frivolous lawsuit.”</p> <p>“This is a claim for a frivolous lawsuit. Under the Personal Injury section of my policy. My homeowners and umbrella policy provide coverage. My HOA is not needed.”</p> <p>Kaczmarek responded:</p> <p>“There is no coverage for personal injury to an insured under the umbrella policy. The personal injury coverage applies to a claimant or third party.”</p>	<p>Gonzalez Decl., ¶12, Exhibit 12.</p>
<p>36. Based on Whiteley’s messages, Kaczmarek opened a separate claim under the Umbrella Policy.</p>	<p>Gonzalez Decl., ¶13, Exhibit 13 at Doc Note 1, 4.</p>
<p>37. On April 27, 2022, Kaczmarek reviewed the Umbrella Policy and requested internal review by a manager and director of the BCS Complaint in conjunction with the Umbrella Policy.</p>	<p>Gonzalez Decl., ¶13, Exhibit 13 at Doc Note 6.</p>

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
38. On April 27, 2022, Manager of Claims Operations Alisa Kuzma-Holmes (“Holmes”) reviewed and agreed the duty to defend was not triggered under the Umbrella Policy, stating: “Agree w/[Kaczmarek] recommendation. Accusations do not meet definition of occurrence and no property damage present. [Outside counsel] is reviewing coverage under [homeowners] policy – doc #29 – request to have review under umbrella as well”.	Gonzalez Decl., ¶14, Exhibit 14.
39. On April 28, 2022, Gonzalez reviewed the Umbrella Policy and agreed with Kaczmarek and Holmes’ coverage recommendations, stating: “DCO does not see that allegations meet the def of [bodily injury, property damage] or occurrence as outlined in the policy and therefore does not see duty to defend but would like further review by [outside counsel] and give authority for same”.	Gonzalez Decl., ¶15 Exhibit 15.
40. On April 27, 2022, Kaczmarek retained outside counsel Mark Israel (“Israel”) to provide a coverage review.	Gonzalez Decl., ¶16, Exhibit 16.
41. On November 21, 2024, Israel was deposed in this matter (“Israel’s	Ross Decl., Exhibit 17 Depo [depo 8:24-9:1].)

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	Deposition”). Israel testified:	
3	Q: And how long have you	
4	specialized in insurance coverage?	
5	A: Thirty-seven years.	
6		
7	42. On May 3, 2022, Kaczmarek sent a	Gonzalez Decl., ¶17, Exhibit 18.
8	digital message to Whiteley	
9	notifying him USAA CIC was “still	
10	completing our coverage review of	
11	your loss”.	
12	43. On May 3, 2022, Whiteley sent a	Gonzalez Decl., ¶17, Exhibit 18.
13	digital message to Kaczmarek	
14	stating:	
15	“ . . . This is covered under the	
16	personal injury section of my	
17	homeowner’s policy under g.	
18	Malicious prosecution and	
19	humiliation. This Complaint is no	
20	more than judicial extortion.	
21	Plaintiff’s allegations are a work of	
22	fiction designed to intimidate	
23	Defendant McNamara into	
24	surrendering a domain name she	
25	purchased with her own funds and	
26	in her own name years prior to her	
27	involvement with [BCS] and never	
28	transferred to the company”.	
	44. On May 10, 2022, after having been	Gonzalez Decl., ¶18, Exhibit 19.
	out of office for training,	
	Kaczmarek contacted Whiteley to	
	discuss the claims, and left him a	
	voicemail.	
	45. On May 12, 2022, Whiteley sent	Gonzalez Decl., ¶18, Exhibit 20.

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	Kaczmarek a digital message	
3	claiming his voicemail was	
4	“unresponsive and breaches	
5	USAA’s duty to defend”.	
6	Kaczmarek responded:	
7	“ . . . I did reach out to the outside	
8	counsel that is completing the	
9	coverage review for your claim and	
10	was advised that they hope to have	
11	the review completed by Monday.	
12	Once i receive their response, I will	
13	follow up with you to discuss our	
14	position.”	
15	46. On May 16, 2022, Israel notified	Gonzalez Decl., ¶20, Exhibit 21.
16	Kaczmarek of his recommendation	
17	that USAA CIC’s duty to defend	
18	was not triggered under the	
19	Homeowners Policy or Umbrella	
20	Policy, stating:	
21	“I conclude that there is no duty to	
22	defend this matter which allege	
23	violations of state and federal anti-	
24	hacking statutes for the reasons set	
25	forth in the attached response letter”	
26	Kaczmarek copied Israel’s e-mail	
27	into the claim file’s Activity Log	
28	and noted he would advise	
	Whiteley and Whiteley’s counsel of	
	the coverage determination.	
	47. Israel attached a ten-page long draft	Gonzalez Decl., ¶20, Exhibit 22.
	response letter to Whiteley’s	
	counsel which set forth Israel’s	

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	conclusions and provided a detailed	
3	recitation of the BCS Complaint,	
4	the Homeowners Policy language,	
5	the Umbrella Policy language, and	
6	analysis including citations to	
7	relevant California case law.	
8	Israel’s letter provided four separate	
9	reasons USAA CIC’s duty to	
10	defend was not triggered.	
11	48. On May 16, 2022, Kaczmarek	Gonzalez Decl., ¶21, Exhibit 23.
12	called Whiteley to notify him of	
13	USAA CIC’s coverage	
14	determination. Kaczmarek noted he	
15	“explained to ni the outcome of the	
16	review” and “advised a denial letter	
17	will be drafted under each policy	
18	and sent to him and his attorney”.	
19	Kaczmarek further noted Whiteley	
20	“request to have callback from my	
21	manager to discuss his claim”.	
22	49. On May 17, 2022, Kaczmarek sent	Gonzalez Decl., ¶22, Exhibit 24.
23	Whiteley and his counsel written	
24	correspondence notifying him of	
25	USAA CIC’s coverage	
26	determination that its duty to defend	
27	was not triggered, explaining the	
28	grounds for the denial of the claims,	
	and attaching Israel’s responsive	
	letter.	
	50. On May 17, 2022, the USAA CIC	Gonzalez Decl., ¶23, Exhibit 25.
	Member Advocacy Team	
	investigated Whiteley’s complaint	
	and called him to discuss.	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
<p>51.On May 20, 2022, Whiteley spoke with Kaczmarek on the phone and claimed “he never requested to file a claim under his umbrella policy” and “disputed ever speaking to [Kaczmarek] prior to our conversation last Monday”.</p> <p>Whiteley then “advised [Kaczmarek] he had recorded the call for reference”, without notifying Kaczmarek or obtaining his consent, which Kaczmarek did not give.</p>	<p>Gonzalez Decl., ¶24, Exhibit 26, at Doc Note 87.</p>
<p>52.On May 23, 2022, Gonzalez called Whiteley. Gonzalez summarized the call, noting:</p> <p>“[Whiteley] alleges no communication about the claims process” . . .</p> <p>“ . . . he understands that the complaint outlined in the law suit does not meet the definitions in the contract but is unhappy with the handling of the claim . . .”</p> <p>“he said that his attorneys will take it from here”.</p>	<p>Gonzalez Decl., ¶24, Exhibit 26 at Doc Note 88.</p>
<p>53.On September 21, 2023, Whiteley’s counsel sent written correspondence to USAA CIC demanding “immediate withdrawal of the wrongful denial”.</p> <p>The letter disputed USAA CIC’s</p>	<p>Gonzalez Decl., ¶25, Exhibit 27.</p>

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
coverage determination and set forth Whiteley’s counsel’s factual and legal positions.	
54. On September 21, 2023, Kaczmarek reviewed the correspondence from Whiteley’s counsel and noted he would “forward the document to [MCO Holmes] for further review and to discuss the next steps”.	Gonzalez Decl., ¶25, Exhibit 28 at Doc Note 112.
55. On September 21, 2023, Holmes reviewed the written correspondence from Whiteley’s counsel and instructed Kaczmarek to “send the letter to [outside counsel Isrel] to review to determine if the additional information would change opinion” and to advise Whiteley and his counsel of the same.	Gonzalez Decl., ¶25, Exhibit 28 at Doc Note 113.
56. On September 22, 2023, Kaczmarek forward the written correspondence from Whiteley’s counsel to Israel and “requested [Israel] review and verify if anything included in the letter changes our opinion”. Kaczmarek also notified Whiteley’s counsel of USAA CIC’s continued review.	Gonzalez Decl., ¶25, Exhibit 28 at Doc Note 115.
57. On November 9, 2023, Kaczmarek received e-mail correspondence from Israel which he copied into USAA CIC’s claim file. Israel stated:	Gonzalez Decl., ¶26, Exhibit 29.

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2		
3	“While this matter is somewhat	
4	esoteric and complex, I believe a	
5	careful review of the points raised	
6	by [Whiteley’s counsel] indicates	
7	that his arguments are factually and	
8	or legally insufficient to trigger	
9	coverage under either policy issued	
10	to Mr. Whiteley. You will see the	
11	reasoning for that conclusion	
12	explained in detail in the letter”,	
13	which was attached.	
14	58. Israel attached a draft responsive	Gonzalez Decl., ¶26, Exhibit 30.
15	letter to Whiteley’s counsel to his	
16	November 9, 2023 e-mail	
17	correspondence.	
18		
19	The letter set forth a detailed	
20	explanation of Israel’s	
21	recommendations as to coverage	
22	and his consideration and response	
23	to the positions taken by Whiteley’s	
24	counsel in his September 5, 2023	
25	letter.	
26		
27	Israel stated:	
28		
	“We have carefully reviewed the	
	issues raised by your	
	correspondence as well as the	
	federal court pleadings and Mr.	
	Whiteley’s USAA CIC policies. We	
	find no coverage allegations in the	
	complaint pertaining to Mr.	
	Whiteley that would trigger a duty	
	to defend the lawsuit or to	
	indemnify any of the damages	
	alleged.”	

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	Israel then addressed and responded	
3	to each allegation within the BCS	
4	Complaint that Whiteley's counsel	
5	claimed triggered USAA CIC's	
6	duty to defend. (<i>See</i>	
	WHITELEY_CF_383-386.)	
7	59. On November 9, 2023, Kaczmarek	Gonzalez Decl., ¶27, Exhibit 31.
8	sent written correspondence to	
9	Whiteley's counsel affirming	
10	USAA CIC's coverage	
11	determination and copying Israel's	
	draft response letter.	
12	60. At Israel's Deposition, he testified:	Ross Decl., Exhibit 17 at 25:20-26:2.
13	Q: Well, the complaint alleges	
14	various facts, right? It makes –	
15	A: Yes, it does. It's very clear and	
16	detailed. Which, again, it is very	
17	clear and detailed, it alleges	
18	precisely what it wishes to allege	
19	and it does not allege any	
20	defamatory statement of fact by Mr.	
	Whiteley against the plaintiff.	
21	61. At Israel's Deposition, he testified:	Ross Decl., Exhibit 17 at 23:2-22;
22	Q: What about paragraph 48, same	24:5-23; 25:5-15.
23	sort of line of questioning?	
24	A: I read that the same way. That's	
25	an impersonation of BCS and also	
26	is defendant singular. So I don't see	
27	any clear factual allegation of	
28	defamation on the part of Mr.	
	Whiteley in that paragraph.	

<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
<p>Q: Does it have to be a clear factual allegation to trigger the duty to defend?</p> <p>A: Yes. There has to be a factual allegation. It can't be based on speculation as to what the intent was. Particularly in my opinion when the cause of action is not alleged and never was alleged. And this is not a complaint that was not carefully drafted. It's obvious on its face it was very carefully drafted. It refers only to specified computer fraud and criminal statutes. So, in my opinion, no, this doesn't come anywhere near sufficient factually to allege a defamation cause of action with respect to Mr. Whiteley.</p> <p>* * *</p> <p>Q: Does paragraph 78 of the BCS complaint allege defamation?</p> <p>A: I don't believe it does. It refers to a violation of a California Penal Code Statute.</p> <p>[colloquy omitted]</p> <p>Q: So it says: "Defendants . . . permanently damaged BCS's reputation and goodwill with the public". That's not enough to trigger allegations of defamation?</p> <p>A: No. It's certainly possible to damage somebody's reputation and goodwill with the public without</p>	

1	<u>UNDISPUTED FACT</u>	<u>EVIDENCE</u>
2	defaming them. For example, taking	
3	down their website.	
4	* * *	
5	Q: But the fact that the complaint	
6	says that defendants engaged in	
7	dissemination of false information	
8	or damaged BCS's reputation or	
9	disclosed misleading information to	
10	the public, all of the paragraphs that	
11	we just reviewed?	
12	A: I would answer it exactly the	
13	same way. That calls for	
14	speculation as to what the allegation	
15	was, that this was intended to be an	
16	allegation of a defamatory	
17	falsehood made by Mr. Whiteley	
18	about the plaintiff. It's not the	
19	complaint. It's nowhere in the	
20	complaint.	
21	62. At all times during the handling of	Gonzalez Decl. at ¶¶28-29.
22	the claim, Kaczmarek and his team,	
23	including but not limited to Holmes	
24	and Gonzalez, reviewed all	
25	information provided, kept an open	
26	mind, never made any decision or	
27	conducted any activity on the claim	
28	with any intent to cause harm, and	
	never intended to make nor did	
	make any misrepresentations to	
	Whiteley or his counsel.	
	//	
	//	

1 Dated: January 31, 2025

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